Om Parkash & others vs State of Haryana

Present : Mr.N.K.Sanghi, Advocate,
for the petitioners.

Mr.Deepak Girotra, AAG, Haryana.

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Prayer in the present revision petition is for setting aside the order dated 2.8.2005, passed by the learned Additional Sessions Judge, Bhiwani, summoning the petitioners to stand trial alongwith the already arraigned accused.

Counsel for the petitioners contends that the petitioners have been summoned to stand trial, pursuant to an order, passed under Section 319 of the Cr.P.C. The learned trial Court relied upon Ex.PB, a statement, made by Hem Raj, the first informant, and brother of the deceased Mukesh Devi, as also his oral deposition as PW2, to arrive at a conclusion that there was sufficient material on record to proceed against the petitioners and they should, therefore, be summoned as accused to face trial for the commission of offences, punishable under Sections 302/120-B read with Section 34 of the IPC. It is argued that the statement, Ex.PB, and the oral deposition of Hem Raj, as PW2, clearly reveals that Hem Raj did not witness the commission of the alleged offence. His knowledge as to the participants in the offence and the particulars thereof, is derived from Tejbir, minor son of the deceased. He has deposed that his statements are based upon information, derived from Tejbir. It is urged that his deposition as to the

particulars of the offence and the participants therein being "hearsay evidence" i.e no evidence in the eyes of law, the learned trial Court, erred in summoning the petitioners, on the basis of "hearsay evidence". It is, therefore, prayed that the present petition be allowed and the impugned order set aside.

Counsel for the respondent, on the other hand, contends that the deposition by PW2-Hem Raj cannot be stated to be hearsay evidence, merely on the ground that he had no personal knowledge as to the commission of the crime. It is contended that during the pendency of the present petition, Tejbir, minor son of the deceased, has appeared as PW3, and the learned trial Court, after satisfying itself that Tejbir was sufficiently capable of understanding facts, has recorded his statements. Tejbir, in his deposition, has specifically implicated the petitioners, and supported the deposition of PW2. There is, thus, sufficient evidence to implicate the petitioners and, therefore, the present petition be dismissed.

In response to the aforementioned arguments, counsel for the petitioners submits that on the date of the impugned order, the only "evidence", available to the trial Court, were Ex.PB, and the deposition of Hem Raj as PW2. Tejbir's deposition recorded on 17.8.2006, after the passing of the impugned order, cannot be taken into consideration to uphold the order, passed under Section 319 of the Cr.P.C on 2.8.2005. It is further contended that as Section 319 of the Cr.P.C requires a Court to record satisfaction, on the basis of evidence before it, any evidence, recorded after the passing of an order, under Section 319 of the Cr.P.C, cannot be relied upon to justify the correctness of such an order.

I have heard learned counsel for the parties and perused the

record.

Hem Raj son of Bharpur Singh made a statement to the police, Ex.PB, implicating Sandeep (husband), Om Parkash (father-in-law), Maya Kaur (mother-in-law), Sarita and Sunita (sisters-in-law), in the death of Mukesh Devi, his sister. Ex.PB led to the registration of an FIR. After investigation, police filed a challan, citing Sandeep husband of the deceased and Maya Kaur, her mother-in-law as accused. During the trial, Hem Raj deposed as PW2 that apart from the two accused already arraigned, Om Parkash, the father-in-law, Sarita and Sunita, his daughters, and Rajender and Surinder their husbands were guilty of the murder of Mukesh Devi. The prosecution immediately filed an application, under Section 319 of the Cr.P.C, praying that five persons, named in Hem Raj's deposition, be also summoned to stand trial with the already arraigned accused. The learned trial Court, by placing reliance upon the statement, Ex.PB, and the deposition by PW2-Hem Raj, summoned the petitioners to stand trial. The application was, however, dismissed with respect to Rajender and Surinder.

The sole point, urged by counsel for the petitioners, while impugning the correctness of the order dated 2.8.2005, is that Ex.PB and the oral deposition of PW2 are “hearsay evidence” and, therefore, no evidence in the eyes of law. Therefore, the learned trial Court erred in summoning the petitioners to stand trial with the already arraigned accused.

A perusal of Ex.PB, the statement made by Hem Raj, to the police, and his deposition, before the trial Court, as PW2 reveals that Hem Raj has specifically deposed that Tejbir, minor son of the deceased informed him about the involvement and the particular role, played by Sandeep

(husband), Om Parkash (father-in-law), Maya Kaur (mother-in-law), Sarita and Sunita (sisters-in-law), in the murder of Mukesh Devi (mother of Tejbir). He also deposed that three days thereafter, Tejbir informed him that he did not name all the accused earlier, as he was frightened. Tejbir thereupon proceeded to disclose the names of two other persons, namely, Rajender and Surinder, as persons also involved in the murder of his mother. The statement, Ex.PB, which led to the registration of the FIR, is on similar lines except in so far as the role, assigned to Rajender and Surinder, does not find mention.

Section 59 of the Indian Evidence Act provides that all facts, except the contents of documents or electronic records, may be proved by oral evidence. Section 60 of the aforementioned Act further requires that oral evidence must, in all cases, whatever be direct i.e if it refers to a fact, which could be seen, it must be the evidence of a witness, who says he saw it. It is, thus, apparent that evidence of a witness, who did not see an occurrence, is not evidence of the fact sought to be proved and is, therefore, categorized as “hearsay evidence” i.e some thing which a person declares on information given by some one else. Another expression used for such evidence is “derivative evidence”. When a witness testifies as to information derived from another and the latter is not examined, the testimony of such witness is not admissible being “hearsay evidence.” Where the only evidence before a Court, considering an application, under Section 319 of the Cr.P.C, is “hearsay evidence”, it would be insufficient and inappropriate to summon a person to stand trial alongwith the already arraigned accused, on the basis of such evidence. Section 319 of the Cr.P.C requires that, where it appears from the “evidence” brought before it, any

person, not being the accused, has committed an offence for which such person could be tried together with the accused, the Court may proceed against such person, for the offence, which he appears to have committed. Where the only evidence, available before a Court, is "hearsay" or "derivative evidence" it would not be appropriate and/or safe for a Court to record a finding on such evidence that a person should be tried with the other accused, for an offence, which he "appears to have committed". Power, under Section 319 of the Cr.P.C, is to be exercised sparingly and not on mere demand. An order, passed under Section 319 of the Cr.P.C, entails serious consequences for a person summoned and, therefore, a Court, considering an application, under Section 319 of the Cr.P.C, must ensure that all ingredients, envisaged by Section 319 of the Cr.P.C, are fulfilled, before it proceeds to record a finding, in terms of the provisions of Section 319 of the Cr.P.C. At this stage, it would be appropriate to refer to a judgment of the Hon'ble Supreme Court, as to the nature of the powers, conferred under Section 319 of the Cr.P.C, reported as **Michael Machado & another V. Central Bureau of Investigation & Another,** 2000(2) RCR (Crl.) 75. The relevant extract of the aforementioned judgment reads as follows:-

> "11. The basic requirement for involving the above Section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence

already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well as tried alongwith the already arraigned accused.

12. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons.

Xx xx xx xx

14. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section(4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence

concerned we would say that the Court should refrain from adopting such a course of action."

A perusal of the facts of the present case reveals that the statement, Ex.PB, made to the police, and the deposition of PW2 Hem Raj are based upon information, derived from Tejbir, minor son of the deceased. Hem Raj admittedly is not an eye witness to the alleged murder. His statement, Ex.PB and oral deposition as PW2 are not direct evidence of the fact, sought to be established, namely, the murder of Mukesh Devi. Hem Raj, admittedly, did not see the occurrence and, therefore, his statement, Ex.PB and his deposition as PW2, have to be held to be "hearsay evidence/derivative evidence" and, thus, in my considered opinion insufficient, to have summoned the petitioners. This evidence, however, can and may be relied upon to corroborate the statement of an eye witness.

Counsel for the State of Haryana has contended that after the passing of the impugned order and during the pendency of the present petition, Tejbir, the eye witness, has deposed before the trial Court. In his deposition, he has specifically named the petitioners and their co-accused as participants in the murder of Mukesh Devi, his mother. It is, therefore, canvassed that the aforementioned statement be considered and on that basis, the impugned order be upheld and the present petition be dismissed. As Tejbir's statement was recorded on 17.8.2006, and the impugned order was passed on 2.8.2005, his statement cannot be pressed into service in support of the impugned order.

In view of the fact that on the date of the passing of the impugned order, there was insufficient evidence before the trial Court to summon the petitioners, under Section 319 of the Cr.P.C, the present petition is allowed and the order, dated 2.8.2005, passed by the Additional

Sessions Judge, Bhiwani is set aside. The matter is remitted to the trial Court to decide the application, filed under Section 319 of the Cr.P.C, afresh, in accordance with law, while taking into consideration all the evidence that has come on record. It is, however, made clear that this order shall not be construed to be an expression of a final opinion as to the nature of the evidence on record.

(RAJIVE BHALLA)
JUDGE

September 11, 2006.
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